Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994
No._____

ALBERT ALEXANDER, M.D.
Petitioner

vs

SAM PATTERSON, M.D.
and STATE VOLUNTEER
MUTUAL INSURANCE
COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Submitted by:
ALAN BRYANT CHAMBERS
TIMOTHY R. HOLTON
CHAMBERS, CROW, DURHAM & HOLTON
200 Jefferson Ave. Suite 750
Memphis, TN. 38103
901-525-4297
Attorneys for Petitioner Alexander

QUESTIONS PRESENTED FOR REVIEW

1. Does the statutory construction in this case prevent everyone who suffers medical malpractice from seeking relief in court, thereby departing from the accepted and usual course of judicial proceedings so as to require this Honorable Court to exercise its power of supervision?

2. Did Court of Appeals for the Sixth Circuit and the District Court err weighing and evaluating proof and resolving factual issues presented through a Motion for Summary Judgment?

3. Do the decisions of the Court of Appeals for the Sixth Circuit and the District Court violate the provisions and protections afforded in 42 U.S.C. 1985 (2)?

4. Do the decisions of the Court of Appeals for the Sixth Circuit and the District Court improperly overrule the following decisions:

First National Bank of Arizona v. City Service Co. 391 U.S. 253 (1968)
Anderson v. Liberty Lobby Inc. 477 U.S. 242 (1986).
Celotex v. Catrett, 477 U.S. 317 (1986)
United States v. Murphy 937 F. 2d 1032 (6th Cir. 1991)
United States v. August, 745 F. 2d 400 (6th Cir. 1984)
Ghandi v. Police Department of Detroit 747 F. 2d 338 (6th Cir.)?

TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 1

Statutes 2

Statement of the Case 3

Outline of Facts 3

Action of the Trial Court 4

Action of the U.S. Court of Appeals 4

Reasons Relied Upon for the Allowance of the Writ 5

Conclusion 11

Certificate of Service 12

Appendix 13

TABLE OF AUTHORITIES

United States Supreme Court

Anderson v Liberty Lobby, 477 U.S. 242 (1986) .....i, 6, 9

Celotex v. Catrett 477 U.S. 317 (1986) .....i, 6

First National Bank of Arizona v. City Service Co.
391 U.S. 253 (1968) i

Sixth Circuit Court of Appeals:

Ghandi v. Police Department of Detroit i
747 F. 2d 338 (6th Cir.)

United States v. August i
745 F. 2d 400 (6th Cir. 1984)

United States v. Murphy i
937 F. 2d 1032 (6th Cir. 1991)

OPINION BELOW

The Court of Appeals for the Sixth Circuit entered its judgment affirming the Trial Court's Order dismissing Plaintiffs complaint pursuant to a Motion for Summary Judgment on August 10, 1994. A copy of that opinion is contained in the appendix attached hereto. A copy of the Trial Court's Order Granting Summary Judgment is contained in the appendix attached hereto.

JURISDICTION

On August 10, 1994, the Court of Appeals for the Sixth Circuit rendered an Opinion affirming the District Court's Order granting Summary Judgment and dismissing Plaintiffs complaint. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28 Section 1254.

STATUTE INVOLVED

42 U.S.C. 1985 (2):

Obstructing justice; intimidating party, witness or juror. If two or more persons in any state or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;...

STATEMENT OF THE CASE

Specifically at issue in this petition is the Trial Court's dismissal of plaintiffs cause of action for damages for violations of 42 U.S.C. 1985 (2), and the Opinion of the Court of Appeals affirming that decision.

Outline of Facts:

Plaintiff Albert Alexander is a medical doctor who has been retained from time to time to testify as an expert witness in medical malpractice cases primarily on behalf of plaintiffs.

Defendant Patterson is likewise a medical doctor who has spoken out repeatedly against physicians who have testified for Plaintiffs in medical malpractice cases. He is also a member of the Claims Review Committee of Defendant State Volunteer Mutual Insurance Company.

The Defendant State Volunteer Mutual Insurance Company (SVMIC) is an insurance company which provides medical malpractice insurance to physicians practicing in Tennessee, including Defendant and others.

Shortly after Dr. Alexander began reviewing medical malpractice cases and testifying in Court, he became the target of actions by Defendant Patterson and others who sought to dissuade him from testifying for plaintiffs in medical malpractice cases. Later, Defendant and others undertook to retaliate against Dr. Alexander for his having testified for plaintiffs in court proceedings, including a number of medical malpractice cases filed and tried in the United States District Courts.

Dr. Alexander has testified that the actions of the Defendants herein and others have damaged his professional reputation and harmed him financially in his medical practice.

Action of the Trial Court:

The United States District Court for the Western District of Tennessee, Honorable Judge Julia Smith Gibbons, granted Defendants' Motions for Summary Judgment, dismissing Plaintiff's case against the defendants.

In her Order granting Summary Judgment, the District Court ruled that Plaintiff had made out the necessary showing of a conspiracy, but had failed to show that Plaintiff was damaged as a result of that conspiracy. In particular, the trial court found that Defendant SVMIC had a significant financial interest in the actions of experts who testified for plaintiffs in medical malpractice cases.

It is submitted the trial court erroneously concluded that Dr. Alexander had not shown the actions of the conspiracy resulted in any injury to him.

The Trial Court concluded that Summary Judgment should be granted to Defendants and SVMIC, and thus dismissed Plaintiff's complaint.

Action of the United States Court of Appeals for the Sixth Circuit:

In its Opinion affirming the decision of the Trial Court, the United States Court of Appeals for the Sixth

Circuit held that Plaintiff had shown that he was damaged, but had failed to prove a conspiracy. The Court of Appeals for the Sixth Circuit found that Dr. Alexander was being denied membership in a health provider organization, losing physician referrals and being shunned by colleagues as a result of the actions by Defendant and others.

Additionally, the Opinion of the Court of Appeals is inconsistent in and of itself wherein it specifically recites that Patterson . . **"and others** confronted Alexander and tried to dissuade him from testifying in future cases." (Opinion at Page two, attached as Exhibit 1 to Appendix). However, in that same Opinion, the Court concludes that Plaintiff failed to show a conspiracy.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

1. The Court of Appeals for the Sixth Circuit, and the United States District Court in ruling against Plaintiff in this matter, so far departed from the accepted and usual course of judicial proceedings as to require this Honorable Court to exercise its power of supervision?

Your Petitioner would respectfully urge that the Opinion of the Court of Appeals for the Sixth Circuit in this case, along with the initial decision of the Trial Court, is an egregious departure from the accepted and usual course of judicial proceedings and process, and thus requires the intervention of this Honorable Court to prevent an absolute miscarriage of justice.

The Opinion which Petitioner now asks be reviewed, is so wholly inconsistent within the opinion itself as to be irreconcilable.

The Opinion recites that:

". . . [H]e, {Defendant Patterson} and others, confronted Alexander and tried to dissuade him from testifying in future cases [.]" and concludes that such actions caused Plaintiff to be damaged. (Opinion at Page 2).

That Opinion goes on to uphold the dismissal of plaintiffs cause of action because the Court of Appeals found no proof of a conspiracy.

It is this dichotomy which mandates a review of this case by this Honorable Court. The Court of Appeals for the Sixth Circuit found that Defendant and, **"others,"** took actions which harmed the Plaintiff. This finding, it is submitted, is by definition a conspiracy. To then hold that Plaintiff had not shown such a conspiracy is clearly error.

2. The trial court and the Court of Appeals for the Sixth Circuit erred in resolving factual disputes which arose through a Motion for Summary Judgment in a fashion violative of the principles announced by this Court in Anderson v. Liberty Lobby, 477 U.S. 242 (1986) and Celotex v. Catrett, 477 U.S. 317 (1986)?

Plaintiff's case was dismissed pursuant to Motions for Summary Judgment filed by Defendants and SVMIC.

It is respectfully urged that the Trial Court, and in

turn the Court of Appeals for the Sixth Circuit, disregarded the principles established by this court in 1986 in Liberty Lobby and Celotex for considering a Motion for Summary Judgment.

In opposing the Defendants' Motions for Summary Judgment, Plaintiff presented proof which established the following:

1. That the Defendant, as President of the Central Association of Obstetricians and Gynecologists, had openly and vociferously expressed the view that "hired guns," [his pejorative for plaintiffs' experts in medical malpractice cases], should be banished from the sphere of credibility.

2. After openly expressing his belief that plaintiffs' experts should be banished, Defendant was placed on the Claims Review Committee of Defendant SVMIC. This occurred after one Dr. Kelley Avery, a member of the Loss Prevention Committee of SVMIC, heard Defendant deliver his "banishment" speech to a group of Memphis OBGYNs,

3. After his placement on the Claims Review Committee, Defendant began making inquiries into testimony given by Plaintiff Alexander in medical malpractice cases outside of Tennessee particularly a case in Elizabethtown, Kentucky which was tried in the United States District Court.

4. After initially learning about Dr. Alexander's testimony, Defendant, a member of the Claims Review

Committee of SVMIC, met with Dr. Alexander and asked him to stop testifying.

Sworn testimony was presented to the Trial Court wherein Defendant discussed the injuries to Dr. Alexander because of the actions by him and others:

Q. How is he viewed by his peers?
A. In obstetrics and gynecology today?
Q. Yes sir.
A. He's viewed as a hired gun today and not admired today because of that.

Q. When did he become viewed as a hired gun by his peers?
A. Right after we talked about it, in 19 — it was after 1986."

Testimony was also presented by Dr. Alexander himself who testified that as a result of the "hired gun" label which he has been saddled with, his patient referrals from physicians, which he used to a large extent to build his medical practice, had fallen off until there are now no longer any physician referrals of patients to his offices.

Plaintiff would respectfully urge that the trial court and the Court of Appeals for the Sixth Circuit, erred in granting summary judgment, when there were presented numerous issues of material fact which were in dispute at the time of the Motion.

This Honorable Court, in addressing the standard of

review to be used in considering a Motion for Summary Judgment stated: "Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1985).

Your Plaintiff would urge that there is ample proof that Dr. Alexander became the target of Defendant Patterson's "banishment" activities after he learned about Dr. Alexander's testimony in Kentucky and in particular in the Elizabethtown, Kentucky malpractice case which was tried in the United States District Court.

The actions of Defendant and others are a clear violation of 42 U.S.C. 1985 (2) which prohibits a conspiracy between two or more persons:

B. To injure such party or witness in his person or property on account of his having so attended or testified.

Applying the standard of review announced by the U.S. Supreme Court in the Liberty Lobby decision, (supra), it is submitted, Summary Judgment was not appropriate in this case, to for the Court of Appeals to uphold the Trial Court's decision was clearly error.

3. The decisions of the Court of Appeals for the Sixth Circuit and the Trial Court disregard the provisions and protections afforded in 42 U.S.C. 1985 (2)

It is respectfully submitted that the Trial Court's decision and the decision of the United States Court of Appeals for the Sixth Circuit disregard the plain language of 42 U.S.C. 1985 (2), in that the decisions allow retaliatory activities by Defendant and others to go unchallenged.

The provisions of 42 U.S.C. 1985 (2) specifically prohibit two or more persons who **"injure any party of his witness. . . on account of his having so attended and testified."**

In this case, Summary Judgment was upheld, even though the Opinion of the Court of Appeals recites that Defendant and others, "confronted Alexander and tried to dissuade him from testifying in future cases. . . " (Opinion at Page Two) . . . and the conduct caused him damages.

The very language of the Court of Appeals in its Opinion in this case makes out the necessary elements of a 42 U.S.C. 1985 (2) cause of action.

It is respectfully submitted that if this decision is allowed to stand, any witness who testifies in a federal proceeding can be punished for that testimony and can not seek the protections and recompense which was to have been afforded to that witness through 42 U.S.C. 1985 (2).

CONCLUSION

For all the aforementioned reasons, it is respectfully urged that the decisions of the United States District Court and the United States Court of Appeals for the Sixth Circuit result in a miscarriage of justice, requiring the intervention of this Honorable Court.

Your Petitioner, through his undersigned counsel of record, would respectfully urge that justice requires this Petition be granted and the decisions of the United States District Court and the Court of Appeals for the Sixth Circuit be reviewed by this Honorable Court, and after briefing and argument, that those decisions be reversed and this matter be remanded for a trial by jury.

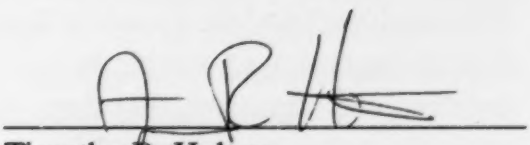
Respectfully
Submitted,

Alan Bryant Chambers
Attorney for Petitioner

Timothy R. Holton
Attorney for Petitioner
200 Jefferson Ave. #750
Memphis, Tennessee 38103
901-525-4297

CERTIFICATE OF SERVICE

The undersigned Timothy R. Holton, attorney for Petitioner, hereby certifies that three copies of the foregoing have been served on counsel for the Respondents, to Mr. John J. Thomason, attorney for Sam Patterson, M.D., One Commerce Square, 29th Floor, Memphis, TN, 38103, (901) 525-8721, and to Mr. Leo Bearman, attorney for SVMIC, First Tennessee Bank Building, 168 Madison Avenue, Memphis, TN, 38103, (901) 526-2000, via first class United States Mail, postage pre-paid, on November 7, 1994



Timothy R. Holton
Attorney for Petitioner

APPENDIX

Not For Publication

FILED
AUG 10, 1994
LEONARD GREEN, CLERK

No- 92-6424

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT ALEXANDER, M.D.,

Plaintiff-Appellant,

v.

ON APPEAL from the United States District Court for the Western District of Tennessee

NOT RECOMMENDED FOR FULL-TEXED PUBLICATION
Sixth Circuit Rule 24 Limits citation to specific situations. Please see Rule 24 before citing in a proveeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

SAM PATTERSON, M.D., AND STATE VOLUNTEER MUTUAL INSURANCE COMPANY,

Defendants -Appellants.

Decided and Filed_____, 1994

Before: **KENNEDY, SILER**, and **BATCHELDER**, Circuit Judges.

SILER, Circuit Judge. Plaintiff Albert Alexander appeals from the summary judgment entered against him. Alexander claims that the district court erred in granting summary judgment on the merits of his 42 U.S.C. § 1985 claim[1] and in doing so while his discovery motion was pending. We affirm, though on grounds other than those relied on by the district court.

Background

Alexander and defendant Sam Patterson were physicians and colleagues at the University of Tennessee's Medical School.

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[1]Alexander had other claims under 42 U.S.C. § 1983, 15 U.S.C. §§ 1-2, and state law, but these have been abandoned on appeal.

Defendant State Volunteer Mutual Insurance Company ("SVMIC") provided medical malpractice insurance to both doctors. Patterson served on SVMIC's claims review committee. As early as 1978, Alexander began testifying as an expert witness in malpractice cases. He was rumored both to have offered questionable testimony and to be a "hired gun" for plaintiffs suing physicians. Upon hearing these rumors, Patterson sought information from SVMIC concerning cases in which Alexander testified. Once Patterson decided that the rumors were true, he and others confronted Alexander and tried to dissuade him from testifying in future cases. Alexander claims that this conduct has made him fearful when he testifies, prevented him from gaining membership in a health provider organization, caused him to lose physician referrals, and prompted his colleagues to shun him.

Analysis

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In responding to a summary judgment motion, the non-moving party must set "forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). We review a district court's grant of summary judgment de novo. Lavado v. Keohane, 992 F.2d 601, 605 (6th Cir. 1993).

Additionally, we may affirm the district court for reasons other than those relied on by the district court.[2] Jarrett v. Kassel, 972 F.2d 1415, 1429 (6th Cir. 1992), cert. denied, 113 S. Ct. 1272 (1993).

Here, the propriety of summary judgment turns on the application of § 1985(2), which proscribes conspiracies that are "designed to obstruct the course of justice in the federal judicial system." Bradt v. Smith, 634 F.2d 796, 800-01 (5th Cir. Unit A Jan. 1981), cert. denied, 454 U.S. 830 (1981). Specifically, § 1985(2) prohibits conspiracies "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such . . . witness . . . on account of his having so attended or testified." Parties raising claims under § 1985(2) must prove a conspiracy between two or more persons, to deter the claimant by force, intimidation, or threat from attending court or testifying freely in a pending matter, which causes injury to the claimant. See Rutledge v. Arizona Bd. of Regents, 859 F.2d 732, 735 (9th Cir. 1988). The district court did not err in granting summary judgment against Alexander because Alexander's proof, that Patterson served on SVMIC's claims review committee and requested information from SVMIC, without more, does not raise a genuine issue as to whether Patterson and SVMIC conspired against him.

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[2]The district court resolved the claim under 42 U.S.C. § 1985 by finding that, although Alexander alleged that Patterson and SVMIC conspired to prevent him from testifying in medical malpractice cases, he did not prove that he was hindered from testifying "freely, fully, and truthfully" or that the alleged conspiracy involved a federal court proceeding. We leave to another day the question whether § 1985 provides a cause of action for witnesses who are not parties, see David v. United States, 820 F.2d 1038, 1040 (9th Cir. 1987), as we find there is no proof of a conspiracy.

Alexander also argues that the district court erred in granting summary judgment without ruling on his motion to compel, which was then pending. Alexander sought, through this motion, discovery of information concerning a case defended by a medical group to which Patterson belonged and information relating to other cases examined by Patterson as a member of SVMIC's claims review committee. However, this information is immaterial because Alexander has no cause of action under § 1985. See Elvis Presley Enter. Inc. v. Elvisly Yours. Inc., 936 F.2d 889, 895 (6th Cir. 1991) ("A failure of proof concerning an essential element ... renders all other facts immaterial"). Therefore, even if the district court erred in granting summary judgment without ruling on Alexander's motion, the error was harmless.

For the foregoing reasons, we AFFIRM the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ALBERT ALEXANDER, M.D.
Plaintiff,
VS.
SAM PATTERSON, M.D.,
et al.,

Defendants.

No. 90-2474-G

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DISMISSING PENDENT STATE CLAIMS

Before the court are the motions for summary judgment of defendant Dr. Sam Patterson and defendant State Volunteer Mutual Insurance Company (SVMIC). Plaintiff Dr. Albert Alexander originally filed suit in this matter on July 8, 1990, against eight defendants, seeking monetary damages for the alleged deprivation of his constitutional rights in violation of 42 U.S.C. §§ 1983 and 1985(2), and for monopolization and boycott in violation of the Sherman Act, 15 U.S.C. § 1 and 2. Plaintiff also brought pendent state law claims of slander, intentional infliction of emotional distress, unfair competition, disparagement, and tortious interference with his business.

On July 31, 1991, this court dismissed all of plaintiff's claims under § 1983 and § 1985(2) against several of the original defendants. The court also dismissed plaintiff's antitrust claims and his state law claims for slander, unfair competition and negligent or intentional infliction of emotional distress against all of the defendants.

This document entered on docket sheet in compliance with Rule 58 and/or 10 (a) FRCP on 10-16-92

After this order was entered, plaintiff voluntarily dismissed his remaining claims against three of the defendants. Plaintiff's only remaining claims are those brought against defendants Patterson and SVMIC under § 1983, § 1985(2), and state common law for disparagement and tortious interference with business.

Federal Rule of Civil Procedure 56 provides that a motion for summary judgment shall be granted if, based on the record as a whole, "there is no genuine issue as to any material fact and... the moving party is entitled to judgment as a matter of law." In a motion for summary judgment, the moving party "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as the inferences drawn therefrom must be read in the light most favorable to the party opposing the motion." Kochins v. Linden-Alimak. Inc., 799 F.2d 1128, 1133 (6th Cir. 1986).

When confronted with a properly supported motion for summary judgment pursuant to Rule 56(e), the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." A genuine issue of material fact exists "if the evidence [presented by the non-moving party] is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. It is not the movant's responsibility to disprove an issue upon which the plaintiff bears the burden of proof. The non-moving party must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

1. Plaintiff's § 1983 claim Plaintiff's claim under § 1983 alleges that Patterson and SVMIC violated Alexander's rights under the First Amendment to the United States Constitution by taking action to remove him from his position on the teaching faculty of the University of Tennessee Medical School because he testified for the plaintiffs in numerous medical malpractice cases.[1]

Plaintiff has offered no support beyond the simple allegations made in his complaint and deposition that he was considered for removal from the teaching faculty because he testified for or otherwise supported plaintiffs in malpractice actions. Alexander's removal was first discussed in a meeting of the Residents Advisory Committee at Baptist Hospital East, where several of the residents related to Dr. Ryan that they were uncomfortable working with Alexander. Alexander was apparently not the only doctor whom the residents requested be removed from

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[1] In an order entered July 31, 1991, on defendants' motion to dismiss, or in the alternative, for summary judgment, this court dismissed plaintiff's procedural due process claim brought under § 1983 on the ground that plaintiff had not alleged that he had been deprived of a protected property interest. Plaintiff's § 1983 claim alleging that defendants had conspired to violate his First Amendment rights by attempting to have him removed from the University of Tennessee faculty remains before the court. See Order on Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, July 31, 1991, at 8.

The court should note that plaintiff originally alleged that some of the original eight defendants had conspired to eliminate his referral business in the area of infertility medicine. Having now conducted discovery, plaintiff has offered no evidence linking Patterson or SVMIC to a decline in his referral business, nor has he even addressed the issue directly in his responses to defendants' motions for summary judgment. Defendants have, however, offered substantial evidence tending to show that any decline in plaintiff's referral business is attributable to factors far outside their control.

the list of teaching faculty. Defendant Patterson is not alleged to have been at the meeting, nor is it alleged that he attempted to influence the residents to ask for Alexander's removal.

In a letter from Dr. George M. Ryan, Jr., a professor at the University of Tennessee, to Patterson, who was the Chief of Residents at the time, Ryan stated that the University of Tennessee residents at Baptist Hospital East had requested that Alexander be removed from the teaching faculty. The depositions of Dr. Pat Morgan, Dr. Marion Larson-McCord, and Dr. Nancy Klein overwhelmingly support Ryan's statements to Patterson in the letter. The record reveals that a number of residents had very specific complaints about Alexander, including several examples of inappropriate behavior. Alexander has offered nothing to counter or even explain the evidence the defendants have provided regarding the reason he was considered for removal.

According to Ryan's deposition, defendant Patterson was very reluctant to have Alexander removed. Patterson spoke favorably of Alexander in a meeting he had with Ryan in which they discussed the removal of doctors from the faculty. It appears from the record that Alexander has not been, to this day, removed from the faculty at the University of Tennessee, despite the recommendation of the residents. It appears quite possible that Alexander was not removed because of Patterson's support, and because Patterson was willing to excuse Alexander's behavior because Alexander was "competent" but "having a difficult time" when the issue was first discussed.

Plaintiff has offered no evidence connecting SVMIC in any way with the issue of his removal from the teaching faculty at the University of Tennessee.[2] The only possible connection that

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[2] SVMIC is a proper defendant in plaintiff's § 1983 claim because it is alleged to have conspired with a state actor to deprive plaintiff of his constitutional rights.

plaintiff makes is the fact that Patterson is a member of SVMIC's claims review board, a committee of doctors that reviews the medical records related to malpractice actions filed against doctors insured by SVMIC. Alexander alleges that because Patterson as a member of SVMIC's claims adjustment board (and perhaps discussed Alexander's testimony in medical malpractice with SVMIC officers or members of that board), there was therefore a conspiracy between Patterson and SVMIC to have Alexander removed from the faculty at the University of Tennessee.

Alexander has not come forth with any evidence linking Patterson to his removal from the faculty, much less raised a genuine issue for trial as to SVMIC's involvement.[3] Patterson and SVMIC, on the other hand, have established that Alexander was considered for removal on the residents' recommendation. - There is no doubt that Patterson generally disapproved of doctors testifying for a fee against other doctors in medical malpractice cases, nor is there any doubt that SVMIC has a financial stake in many of the medical malpractice actions that are tried in Tennessee. Alexander, however, has not linked Patterson's disapproval or SVMIC's financial interest to any injury or threat of injury to himself.

There is no genuine issue of material fact regarding the alleged deprivation of plaintiff's First Amendment rights. Plaintiff has offered nothing beyond a mere allegation that defendants violated his First Amendment rights, and has not connected either Patterson or SVMIC with an attempt or a conspiracy to have him removed from the University of Tennessee teaching faculty. The motions of defendants Patterson and SVMIC for summary judgment on plaintiff's § 1983 claim are therefore granted.

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[3] Alexander was quite clear in his deposition that he was unaware of any specific activity by or on behalf of SVMIC that had injured him or interfered with his business. The discovery conducted by Alexander and filed with this court discloses no basis for concluding that SVMIC attempted to have Alexander removed from the University of Tennessee faculty.

2. Plaintiff's § 1985(2) Claim Defendants also argue that there are no facts to support plaintiff's claim under 42 U.S.C. § 1985(2). Section 1985(2) provides, in relevant part, that there shall be a violation:

> [I]f two or more persons in any state or territory conspire to deter by force, intimidation, or by threat, any party or witness in any court of the United States from attending such court, or from testifying to any part pending therein, freely, fully, and truthfully, or to injure any party or witness in his personal property on account of his having so attended or testified . . . .

In its order on defendant's motion to dismiss, entered on July 31, 1991, this court found that plaintiff did state a claim under § 1985(2) because he had testified in federal courts in medical malpractice actions and had sufficiently alleged a conspiracy between the defendants to deter such future testimony. The court must now address defendants' motions for summary judgment on plaintiff's § 1985(2) claim.

The court has very little guidance in interpreting § 1985(2), particularly with regard to the first part of that section.[4] But having now examined in greater detail plaintiff's specific allegations, the support offered for those allegations, and the cases construing § 1985(2), the court finds that defendant's motion for summary judgment should be granted.

Section 1985(2) does not in itself provide a cause of action for violations of the section. The cause of action is found in the final clauses of § 1985(3), which provides "...the party so injured or deprived may have an action for the recovery of

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4 See, e.g., Allen v. Allied Plant Maintenance Co., 636 F. Supp. 1090 (M.D. Tenn. 1986) (citing Brawer v. Horowitz, 535 F.2d 830, 837 (3rd Cir. 1976), construing the "perfidious syntax of § 1985 (2) with some reserve" given the "dearth of authority to light the way").

damages occasioned by such injury or deprivation, against any one or more of the conspirators." See Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175, 1180 (7th Cir. 1989).

To establish a claim under the first part of § 1985(2),[5] the plaintiff must show (l) a conspiracy between two or more persons, (2) to deter a witness by force, intimidation or threat from attending court or testifying freely in any pending matter, which (3) results in injury to the plaintiff. David v. United States, 820 F.2d 1038 (9th Cir. 1987). See also Miller v. Glen & Helen Aircraft, Inc., 777 F.2d 496, 498 (9th Cir. 1985); Chahal v. Paine Webber, Inc., 725 F.2d 20, 23 (2d Cir. 1984).

The intent of § 1985(2) is to prevent conspiracies "the object of which is intimidation of or retaliation against parties or witnesses, or grand or petit jurors, in any court of the United States." Brawer v. Horowitz, 535 F.2d 830, 840 (3rd Cir. 1976); Hahn v. Sargent, 523 F.2d 461, 469 (lst Cir. 1975), cert. denied, 425 U.S. 904 (1976). The statute is concerned with conspiracies involving perjury, subornation of perjury, or criminal obstruction of justice. McCord v. Bailey, 636 F.2d 606, 614-17 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981). An action under §1985 (2) must therefore involve the intimidation of witnesses, parties or court officers in an ongoing federal proceeding, and there must be a connection between the conspiracy and the witness, party, or juror. Alsup v. International Union of Bricklayers, 679 F.Supp. 716, 720 (N.D. Ohio 1987). There can be no violation of § 1985(2) unless the plaintiff establishes a nexus between an alleged conspiracy and a federal court proceeding. Allen v. Allied Plant Maintenance Co., 636 F.Supp. 1090, 1093 (M.D. Tenn.

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[5] Plaintiff has made no allegation of class-based animus, and therefore cannot sustain an action under the second half of § 1985(2), which proscribes conspiracies to deny or interfere with equal protection rights. Allen v. Allied Plant Maintenance, 636 F.Supp; 1090, 1093 (M.D. Tenn. 1986). See also Bretz v. Kelman, 773 F.2d 1026, 1029-30 (9th Cir. 1985).

1986). See also Bretz v. Kelman, 773 F.2d 1026, 1029-30 (9th Cir. 1985); Bradt v. Smith, 634 F.2d 796, 801 (5th Cir.), cert. denied, 454 U.S. 830 (1981).

Although Alexander alleges that Patterson and SVMIC conspired to prevent him from testifying for the plaintiff in medical malpractice actions, in both federal and state court, plaintiff has not alleged that he has been in any way injured or deterred from testifying in any particular proceeding in federal court. In particular, plaintiff has not established or even alleged that he was actually hindered from testifying "freely, fully and truthfully" at any time since the alleged conspiracy began, or that the alleged conspiracy has involved any federal proceeding.

Nor has plaintiff sufficiently alleged that defendants' conspiracy has resulted in any injury to him on account of his having "attended or testified" in past cases in federal court. At his deposition, Alexander could not state the number of times he has testified in court or been deposed in medical malpractice cases and could not remember the specific number of times he has testified for or consulted with plaintiffs in such cases during the last year. He has not provided any evidence or support beyond his allegations that he has been hampered or deterred from testifying in malpractice cases in federal court, or that he has been retaliated against because of his testimony. Where the witness or party is not hampered or deterred from testifying in a federal proceeding, there is no deprivation of rights or injury as required by § 1985 (2). Rylewicz v. Beaton Services Ltd., 888 F.2d 1175, 1178 (7th Cir. 1989).

Because plaintiff has failed to allege a sufficient nexus between the alleged conspiracy and an on-going federal proceeding, or that he has actually been deterred from testifying in federal court, defendants' motions for summary judgment on plaintiff's § 1985(2) claim are therefore granted.

3. Pendent state claims The only remaining claims before the court are plaintiff's pendent state law claims for disparagement and tortious interference with his business. Having dismissed plaintiff's federal claims under 42 U.S.C. §§ 1983 and 1985(2), and because there is no diversity jurisdiction under 28 U.S.C. § 1332 as all the parties reside in Tennessee, this court should not exercise jurisdiction over these state law claims. Pendent jurisdiction is a doctrine of discretion; "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. at 726.

For the reasons stated, defendants' motions for summary judgment on plaintiff's claims under 42 U.S.C. §§ 1983 and 1985(2) are granted, and plaintiff's pendent claims under Tennessee law for disparagement and tortious interference with business are dismissed without prejudice.

IT IS SO ORDERED.

Julia Smith Gibbons

JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

October 14, 1992

DATE